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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 SECURITIES AND EXCHANGE COMMISSION,

18 Plaintiff,

19 vs.

20 KENNETH L. SCHROEDER,

21 Defendant.

Case No. C-07-3798 (JW)

DECLARATION OF MARK P. FICKES IN
SUPPORT OF PLAINTIFF'S OPPOSITION
TO DEFENDANT'S MOTION FOR
PROTECTIVE ORDER REGULATING
TIMING OF DEPOSITION

Date: January 15, 2008

Time: 10:00 a.m.

Location: Courtroom 2, 5th Floor

Magistrate Judge Howard Lloyd

22
23 I, Mark P. Fickes, declare that I have personal knowledge of the facts set forth below, and if
24 called as a witness could and would competently testify as follows:

25 1. I am an attorney duly licensed to practice law in the state of California. I am also
26 admitted to practice before the United States District Court for the Northern District of California.

27 2. I am currently employed as trial counsel for the Securities and Exchange Commission
28 ("Commission"). I am counsel of record for the Commission in this litigation.

1 3. On or about November 1, 2007, counsel for the Commission and counsel for
2 defendant Kenneth Schroeder ("Schroeder" or "defendant") met and conferred pursuant to Federal
3 Rule of Civil Procedure 26(f). During the Rule 26(f) meet and confer, counsel for the Commission
4 and Schroeder agreed to work together on the scheduling of depositions and hearings so that the
5 schedule would not be haphazard and chaotic. Although the Commission's counsel did not agree to
6 the request of Schroeder's counsel for 140 depositions, everyone agreed that it would be preferable to
7 avoid setting dates for depositions and hearings where counsel for the opposing party would be
8 unavailable. For example, Schroeder's counsel asked the Commission's counsel not to schedule
9 depositions for the two week period around the Christmas holidays, a request to which the
10 Commission agreed.

11 4. Throughout the entire process of scheduling depositions and court hearings, the
12 Commission has been exceedingly accommodating. To date, the Commission's counsel has agreed
13 to dates for approximately ten depositions sought by the defendant.

14 5. Conversely, and as set forth in more detail below, Schroeder's counsel has repeatedly
15 refused to cooperate meaningfully in setting dates.

16 6. During the Rule 26(f) conference on November 1, I advised Schroeder's counsel that
17 we intended to take Schroeder's deposition early in the litigation. On November 5, 2007, I asked
18 Schroeder's counsel for a date in December 2007 when Schroeder would be available for deposition.

19 7. Schroeder's counsel indicated that no dates in December were available. Schroeder's
20 counsel did not propose any alternative dates. The Commission made it clear to the defense that it
21 wanted to depose Schroeder as soon as possible. Nevertheless, Schroeder's counsel proposed
22 January 29 as the next available date. In fact, however, Schroeder's counsel confirmed that earlier
23 dates were available, but Schroeder's counsel simply did not want the deposition to proceed in
24 December.

25 8. During this same timeframe, Schroeder filed his motion for a stay of discovery.
26 Schroeder's counsel did not meet and confer with the Commission before setting the date for the
27 hearing in December, when Schroeder's counsel had indicated their unavailability for his deposition.
28 Schroeder's counsel then refused to move the hearing date for the motion unless the Commission

1 agreed to move Schroeder's deposition to February 5. The Commission agreed to move the
2 deposition to February 5.

3 9. Schroeder originally noticed the deposition of third-party witness Tom Coffey
4 ("Coffey") for December 7, 2007, in Atlanta, Georgia, without first meeting and conferring with the
5 Commission's counsel. Although none of the Commission's counsel was available on that date,
6 Schroeder's counsel initially refused to move the deposition. Attached hereto as Exhibit A is a true
7 and correct copy of the meet and confer correspondence among counsel regarding the dates for
8 Coffey's deposition. As I explained in my correspondence, for religious reasons, I am unable to
9 attend out of town depositions that occur on a Friday because I cannot work, travel or handle money
10 from sunset on Friday until sunset on Saturday. Consequently, attending an out of town deposition
11 would require me to remain until Sunday morning without the ability to purchase meals. I further
12 explained that December 7 also fell within the Chanukah holiday.

13 10. Schroeder's counsel finally agreed to move Coffey's deposition to December 13.
14 After everyone agreed to the December 13 date, however, Coffee expressed the desire to have
15 counsel represent him. Shortly thereafter, Coffey obtained counsel who requested that the deposition
16 be rescheduled yet again. Schroeder's counsel then moved the deposition to December 21 without
17 consulting with the Commission's counsel to see if they were available.

18 11. Although the Commission's counsel was unavailable, Schroeder's counsel continued
19 to insist on the date. I again explained that attending an out of town deposition on a Friday would be
20 difficult for me. In response, Schroeder's counsel insisted that the deposition proceed on December
21 21, even though none of the attorneys representing the Commission would be available. Attached
22 hereto as Exhibit B is a true and correct copy of the correspondence related to scheduling Coffey's
23 deposition. As the correspondence makes clear, Schroeder's counsel tried to insist unreasonably that
24 counsel for the Commission remain in Atlanta until Sunday, although Schroeder's counsel fully
25 understood the tremendous burden that would place on me. In addition, Schroeder's counsel
26 threatened to raise the issue of my religious practice with the Court at the case management
27 conference set on December 17, 2007. Schroeder's counsel elected not to follow up on that threat.
28

1 12. At the same time that Schroeder was refusing to move the deposition to accommodate
2 the Commission's counsel, he was simultaneously objecting to the representation of Coffey's
3 counsel. Attached hereto as Exhibit C is a true and correct copy of the correspondence in which
4 Schroeder's counsel accuses Coffey's counsel of having a conflict of interest and threatens to bring
5 this perceived conflict to the attention of the Court. Of course, if Coffey's counsel had withdrawn
6 from representing the witness, as demanded by Schroeder's counsel, then the deposition could never
7 have proceeded on December 21.

8 13. Schroeder's counsel ultimately agreed to move Coffey's deposition to January 9. The
9 Commission's counsel agreed to that date. Schroeder's counsel recently advised me that any efforts
10 to remove Coffey's counsel due to an alleged conflict of interest would be deferred until after
11 Coffey's deposition.

12 14. The Commission noticed the deposition of third-party witness Elizabeth Harlan
13 ("Harlan") for December 3, 2007. Attached hereto as Exhibit D is a true and correct copy of the
14 notice of deposition and related correspondence. The Commission's counsel made it clear that there
15 was flexibility regarding the date set for the deposition.

16 15. At the request of Harlan's counsel, and with the prior consent of Schroeder's counsel,
17 Harlan's deposition was re-noticed for December 5. However, due to a dispute between Schroeder's
18 and Harlan's counsel over issues involving attorney-client and work product privileges, and at the
19 request of both Schroeder's and Harlan's counsel, the Commission agreed to delay Harlan's
20 deposition until April 8, 2008. Again, that date was selected with the consent of both Ms. Harlan's
21 and Schroeder's counsel. In addition, the Commission moved Harlan's deposition to afford
22 Schroeder's counsel the opportunity to litigate the privilege issues. Attached hereto as Exhibit E is a
23 true and correct copy of the correspondence among counsel related to the privilege issues and the
24 request to reset the date for Harlan's deposition. As of today, Schroeder's counsel has not filed a
25 motion to litigate the privilege issues.

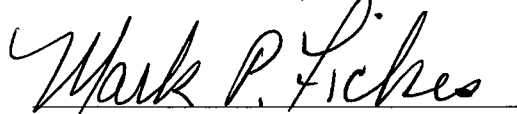
26 16. I am also counsel of record in *SEC v. Gregory Reyes et al.*, C-06-5545 (CRB). The
27 *Reyes* litigation involves allegations of fraudulent backdating at Brocade Communication Systems,
28 Inc. ("Brocade"). Mr. Reyes is Brocade's former Chief Executive Officer. Mr. Reyes was also

1 indicted by the United States in a criminal action. Although he was under indictment, Mr. Reyes sat
2 for deposition in the Commission's enforcement action on the date noticed by the Commission.

3 17. I am also the trial counsel assigned to the matter of *SEC v. Nancy Heinen et al.*, C-07-
4 2214 (JF). The *Heinen* litigation involves allegations of fraudulent backdating at Apple, Inc.
5 ("Apple"). Ms. Heinen is Apple's former General Counsel. Ms. Heinen sat for deposition in the
6 Commission's enforcement action on the date noticed by the Commission.

7 I declare under penalty of perjury that the foregoing is true and correct.

8
9 Executed this 21st day of December 2007 in San Francisco, California

10 
11 Mark P. Fickes